

IN THE
Supreme Court of the United States
OCTOBER TERM 1989

MELVIN TAYLOR, PUBLIC CITIZEN, INC.,
ARTHUR L. FOX II, ALAN B. MORRISON, AND
PAUL ALAN LEVY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and
RYDER TRUCK LINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

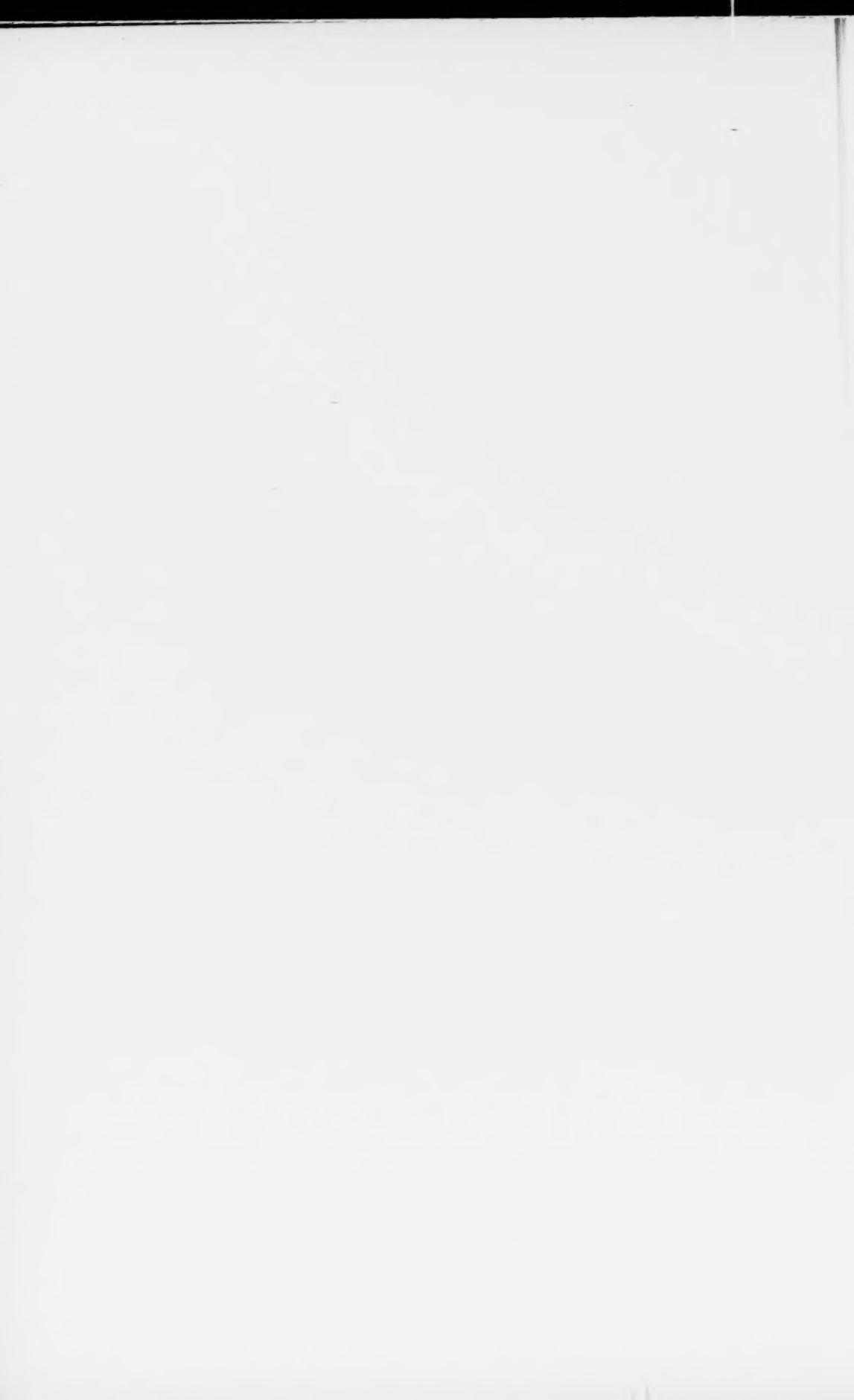
REPLY BRIEF IN SUPPORT OF CERTIORARI

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In defending the refusal of the court below to provide any explanation whatsoever for the denial of petitioners' application for attorney fees, respondent National Labor Relations Board ("Board") cites the local rules of several circuits. Opp. 4.-5. Many of those rules, however, simply provide for the decision of cases without any published opinion or written memoranda, although plainly anticipating some explanation of the decision in either an unpublished memorandum or a bench opinion that would be transcribed and available to the parties. *E.g.*, D.C. Circuit Rule 14(c); Second Circuit Rules § 0.23; Ninth Circuit Rule 36-1. Whatever the propriety of the widespread practice of deciding cases and refusing to accord precedential significance to the explanation for such decisions, that is very different from refusing to explain the decision at all.

Respondent assumes that the lower court did not deny fees based on its novel argument that a charging party is never a prevailing

party because that would have had obvious precedential significance. Opp. 5 n.4. But a decision that the government's position here was "substantially justified" would also be precedentially significant in light of the conclusions of the court of appeals on the merits that the Board's new standard for deferral to arbitration "cannot pass muster," *Taylor v. NLRB*, 786 F.2d 1516, 1520 (11th Cir. 1989), "does not protect sufficiently an employee's rights granted by the National Labor Relations Act," *id.* at 1521, "gives away too much of the Board's responsibility under the NLRA," *id.* at 1522, "cannot be reconciled with the need to protect statutory rights," *id.*, "appears on its face to represent an abdication of Board responsibility" under the Act, *id.*, and is "unmindful of the Board's statutory responsibility and of individual rights." *Id.* These statements reflect the forceful ruling of the court below that the Board's decision had plainly been contrary to law, thus making it hard to imagine how the Board's position could have been substantially justified. Although there may be some explanation for denying fees in this case on the ground that the Board was "substantially justified," we have difficulty imagining it.¹

Respondent also faults petitioners for "cho[osing]" not to seek review in this Court on the merits of the denial of fees. But what would the Question Presented be? "Did the Court of Appeals err in denying fees because . . . [reason to be filled in later]"? Petitioners cannot show that the decision below is "in conflict with the decision of another court of appeals," Supreme Court Rule 17.1(a), or that the court below "has decided an important question of federal law," Supreme Court Rule 17.1(c), when petitioners have no idea what the basis for the decision below was. Only if the court of appeals first explains its decision, will petitioners then be able to evaluate its reasons and determine whether the case warrants review

¹Perhaps the court below thought that, although the Board's decision was contrary to law, the Board was substantially justified in arguing the contrary position in the court of appeals. But that unspoken rationale would conflict with the 1985 amendments to the Equal Access Access to Justice Act, 28 U.S.C. § 2412(d)(2)(D), according to which the "position of the United States" that must be substantially justified includes the action or failure to act on which the petition for review is based, as well as the position in litigation.

under the standards of Rule 17. Respondent may prefer a one-step procedure, whereby petitioners have to speculate about the reasons for the decision below in their request for review in this Court, but that approach places a far greater burden on this Court than a rule that requires a reasoned explanation whenever there is a serious request for fees under a statute that presumes that fees should be awarded. Until the reasons are set forth, a petition on the merits would be an inappropriate imposition on this Court's docket.

As Judge Tamm explained in *Davis v. Clark*, 404 F.2d 1356, 1358 (D.C. Cir. 1968), the requirement of providing a simple explanation for a decision "is not onerous if the matter was dealt with in a conscientious manner in passing on the merits." The fact that fee decisions of the courts of appeals are rarely reviewed by this Court only increases the need for those courts to prepare explanations for their decisions if for no other reason than that the discipline of having to set forth reasons decreases the likelihood of erroneous results and of disparate treatment of similar cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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